FILED
JAN 8 1999
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No. 98-607

In The

Supreme Court of the United States

October Term, 1998

JERRY GOETZ, d/b/a JERRY GOETZ AND SONS, individually and on behalf of others similarly situated,

Petitioner,

v.

DAN GLICKMAN, Secretary, United States Department of Agriculture; WILLIE REIBEL; RODNEY and LARRY MENSE; JAN LYONS; KANSAS LIVESTOCK ASSOCIATION; NATIONAL CATTLEMEN'S ASSOCIATION; and, NATIONAL LIVESTOCK AND MEAT BOARD;

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTIONS PRESENTED

The questions presented herein are:

1. Do the QSBCs[1] spend the assessment funds which they retain outside of the scope of the BPA?[2]

2. Do the decisions of the district court and of the court of appeals in *Frame*[3] reject Goetz's argument that the BPA is a tax?

3. Did Congress ever intend the BPA to be a regulation of interstate commerce?

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[1] "QSBCs" is the abbreviation used herein for qualified State beef councils.

[2] "BPA" is the abbreviation used herein for the Beef Promotion and Research Act of 1985 ("BPA"), 7 U.S.C. §§ 2901-2911 (1997).

[3] The complete citation to *Frame* is *U.S. v. Frame*, 658 F.Supp. 1476 (E.D. Penn. 1987), *aff'd*, 885 F.2d 1119 (3rd Cir 1989), *cert. denied*, 493 U.S. 1094 (1990).

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ARGUMENTS

I. The QSBCs Spend the Assessment Funds Which They Retain Outside of the Scope of the BPA.

In Glickman's Opposition, Glickman makes the following statements:

> The funds retained by the qualified state beef councils are not, as petitioner asserts (Pet. 12), "outside of the scope of [the Act]." Those funds must be used by the councils to advance the objectives of the Act.

Glickman's Opp. at 8. These statements are untrue.[4] There is absolutely no requirement contained in the BPA, the Order, or any of the rules and regulations thereunder which dictates that the $.50 of each $1.00 retained by the QSBCs from the funds collected from the assessment imposed by the BPA be used to advance the objectives of the BPA. In fact, there is no requirement that QSBCs even expend such funds on beef promotion or research at all. In the hope of avoiding or overcoming this observation, Glickman points to three requirements of the BPA and the Order which he believes support his position. *Id.* The following is a closer look at each of these requirements.

To start with, Glickman points out that a QSBC must conduct research and promotion activities of the sort specified in the BPA as a prerequisite to qualifying for certification as a QSBC. *Id.* This is true. *See* 7 U.S.C.

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[4] In itself, the fact that Glickman is unable to provide a citation to any provision of the BPA, the Order, or to any rule or regulation thereunder which directly supports the proposition set forth in the second sentence of the foregoing quotation is telling.

§ 2902(14); 7 C.F.R. § 1260.181(b)(1). However, this prerequisite to certification does not restrict the QSBCs from being involved in additional activities totally unrelated to beef promotion and research. Furthermore, such prerequisite to certification does not even require that QSBCs expend any of the assessment funds they retain under the BPA on beef promotion and research activities.

Glickman then points out that QSBC are prohibited from using assessment funds which they retain for activities barred by the BPA. *Glickman's Opp.* at 8. Only two such prohibitions exist. *See Goetz's Pet.* at 12; 7 C.F.R. § 1260.181(b)(7). The first of these restrictions is that QSBCs are not allowed to use assessment funds which they retain "for the purpose of influencing governmental policy or action." *Id.* This is hardly a restriction. QSBCs can easily reallocate other funds available to them for such off-limit uses. *See Goetz's Pet.* at App. 92-93. In this manner, assessment funds retained by QSBCs actually enable QSBCs to increase the amounts which they spend on influencing governmental policy or action in spite of this restriction. The second of these restrictions is that QSBCs are not allowed to use assessment funds which they retain "to fund plans or projects which make use of any unfair or deceptive acts or practices including unfair or deceptive acts or practices with respect to the quality, value or use of any competing product." 7 C.F.R. § 1260.181(b)(7). Once again, this is hardly a restriction. This is nothing more than is already required by state and federal truth-in-advertising laws.

Finally, Glickman asserts that QSBCs are required to report annually to the Board and the Secretary on their use of assessment funds. *Glickman's Opp.* at 8. This is not

true. The Order requires that each QSBC furnish the Board with an annual report by a certified public accountant showing all funds remitted to such QSBC by collecting persons and producers under the BPA. *See* 7 C.F.R. § 1260.181(b)(6). Such report is not a disclosure of how each QSBC expended the assessment funds which it retained. Rather, it is an independent accounting of the total of all $1.00 assessments remitted to such QSBC by collecting persons and producers under the BPA during the year for which such report is prepared. From this report, the Board can verify that such QSBC has remitted to the Board $.50 of each and every $1.00 collected under the BPA that year.

A closer look at the BPA, the Order, and the rules and regulations thereunder will show the following. Is a QSBC required to account to the Committee or obtain the Committee's prior approval as to how it expends the assessment funds it retains? No! Is a QSBC required to account to the Board or obtain the Board's prior approval as to how it expends the assessment funds it retains? No! Is a QSBC required to account to the Secretary or obtain the Secretary's prior approval as to how it expends the assessment funds it retains? No! Clearly, expenditure of the assessment funds retained by the QSBCs is outside of the scope of the BPA and outside of the authority of the Board, the Committee and the Secretary.

II. The Decisions of the District Court and of the Court of Appeals in *Frame* Do Not Reject Goetz's Argument That the BPA Is a Tax.

In the Intervenors' Opposition, the Intervenors make the statement that the district court and the Third Circuit Court of Appeals in *Frame* squarely rejected all of the challenges to the BPA which Goetz is raising in this case. *Intervenors' Opp.* 6. This is not true. The argument that the BPA is a tax was never even presented to the Third Circuit in *Frame*.[5] *See Frame*, 885 F.2d at 1125 (footnote 4). In addition, contrary to the position of the Intervenors as expressed in footnote 4 of the *Intervenors' Opposition*, the district court's opinion in *Frame* rests almost entirely upon the premise that the BPA is a tax as is hereafter shown.

Mr. Frame's first argument before the district court in *Frame* was that the BPA was an unlawful delegation of Congress' Taxing Power. Solely for the purpose of considering this first argument, the district court in *Frame* assumed *arguendo* that the BPA was an exercise of Congress' Taxing Power. *Frame*, 658 F. Supp. at 1479. But a careful reading of the remainder of the district court's opinion in *Frame* reveals that the district court's analysis of almost all of the remainder of Mr. Frame's arguments rests very heavily on the conviction that the BPA is a tax. In considering Mr. Frame's Fifth Amendment "taking" argument, the district court in *Frame* makes the following statement:

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[5] Neither was the argument that the BPA is a tax brought before this Court in *Wileman*. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130 (1997).

> "Indeed, the power of Congress to impose ***taxes*** is almost immune from constitutional challenge." *Frame*, 658 F. Supp. at 1480 (emphasis added).

Thereafter, in considering Mr. Frame's equal protection argument, the district court in *Frame* used the following rationale:

> "However, in formulating ***taxation*** legislatures possess the greatest freedom of classification. . . . A ***taxing authority*** may impose different specific ***taxes*** upon different trades and professions and may vary the excise upon various products. . . . In summary, if the classification is rationally related to a legitimate government interest the ***tax*** does not violate the right to equal protection.
>
> . . .
>
> Congress could have found that a ***tax*** on the initial sale of cattle was easier to apply than a smaller ***tax*** at every level of the beef industry." *Frame*, 658 F. Supp. at 1480-1481 (emphasis added) (internal quotation marks omitted).

And finally, in considering Mr. Frame's First Amendment arguments, the district court in *Frame* makes the following statement:

> "Although defendants are correct that they are entitled to refuse to associate with other persons and entities, . . . they have cited no cases, and my independent research has uncovered none, in which a valid exercise of ***Congress' taxing power*** violated the First Amendment." *Frame*, 658 F. Supp. at 1481-1482 (emphasis added).

Clearly, the district court in *Frame* was convinced that the BPA is a tax.

III. Congress Never Intended the BPA to Be a Regulation of Interstate Commerce.

Both Glickman and the Intervenors insist that the primary purpose behind the BPA is regulatory rather than to raise revenue. *See Intervenors' Opp.* at 9-10; *Glickman's Opp.* at 5. As their primary support for this position, both Glickman and the Intervenors keep referring to the "findings" contained in § 2901(a) of the BPA. *See Intervenors' Opp.* at 9-10; *Glickman's Opp.* at 7 & 9. However, it must be remembered that the private trade associations within the beef industry which lobbied for the enactment of the BPA also drafted these "findings" into the provisions of the BPA and the Order. *See Aplt. App.* at 404-406. The legislative history of the BPA suggests that Congress never intended the BPA to be a regulation of interstate commerce in the first place:

1.

> "This bill that we are considering is nothing more than enabling legislation. . . . It is not a mandatory program by Government, as some have erroneously charged . . . ." 121 Cong.Rec. 38005 (1975) (statement of Sen. Dole).

2.

> "This is not a Government sponsored program." 121 Cong. Rec. 31440 (1975) (statement of Rep. Albert).

3.

> "This legislation was structured as a 'self-help' measure that would enable the beef industry to employ its own resources and devise its own strategies to increase beef sales, ***while simultaneously avoiding the intrusiveness of government regulation*** and the cost of government 'handouts.'" *Frame*, 885 F.2d at 1122 (emphasis added) (citing the Report of Committee on Agriculture, Beef Research and Information Act, H.R.Rep.No. 452, 94th Cong., 1st Sess. 3 (1975)).

In addition, unlike the statutory structures which were the subjects of the *Head Money Cases* and *Wileman*, the revenue-raising assessment contained in the BPA is its primary and overriding feature. *See Head Money Cases*, 112 U.S. 580, 590 (1894); *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130, 2134 (1997). All other provisions of the BPA are merely incidental to and solely implementing such assessment. Clearly, Congress never intended the BPA to be regulatory.

CONCLUSION

As the foregoing shows, the Tenth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. Therefore, this petition for writ of certiorari should be granted.

Respectfully submitted

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